FILE COPY

FILED
JAN 26 193
CHARLES ELMORE CRO
CLER

Supreme Court of the United States

OCTOBER TERM, 1930.

UNITED STATES OF AMERICA, *Petitioner,* v. THEODORE MICHEL, *Respondent.*	No. 79.
UNITED STATES OF AMERICA, *Petitioner,* v. LOUIS KRIEGER, *Respondent.*	No. 80.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

DONALD HORNE,
MORTIMER J. WOHL,
Attorneys for Respondents.

The Hecla Press, 225 Varick St., N. Y. Tel. WAlker 5-1480.

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	3
Argument	4
Conclusion	23

CITATIONS

Cases

	PAGE
Adams v. Woods, 2 U. S. (L. Ed.) 296	13
Alten v. Louisiana, 103 U. S. 80	13
Bowen v. Minneapolis, 47 Minn. 155, 49 N. W. 683	11
Calhoun Gold Mine Co. v. Ajax Gold Mine Co., 27 Colo. 1	14
Chew Heong v. U. S., 112 U. S. 536	14
Connell v. Hopkins, 43 Fed. (2nd) 773, 776	20
Cory v. Carter, 48 Ind. 337	14
Daily Pantagraph v. U. S., 37 Fed. (2nd) 783, 788, 789	19
Delaware, The, 161 U. S. 459	14
Ex parte Simonton, 9 Port. (Ala.) 390, 33 Am. Dec. 320	11
Fleckner v. U. S. Bank, 5 U. S. (L. Ed.) 631	14
French v. Edwards, 13 Wall. 506, 511	5, 8
Gallup v. Smith, 59 Conn. 354, 22 Atl. 334	11
Girard Trust Co. v. U. S., 270 U. S. 163	20
Glover v. U. S., 164 U. S. 294	14
Kennelly v. Jersey City, 57 N. J. L. 293, 30 Atl. 331	11
Logan v. U. S., 144 U. S. 263	11
Lyon v. Alley, 130 U. S. 177	11
McKesson & Robbins, Inc. v. Edwards, 38 Fed. (2nd) 887, 888	20
Montclair v. Ramsdell, 107 U. S. 147	13
Murdock v. Memphis, 22 U. S. (L. Ed.) 429	14

PAGE

Paulina, The, v. United States, 3 U. S. (L. Ed.) 266.. 14
Pennington v. Coxe, 2 Franch. 33, 2 U. S. (L. Ed.) 199 13
People v. Brooks, 1 Denio (N. Y.) 457, 43 Am. Dec. 704 11
Pollard v. Bailey, 22 U. S. (L. Ed.) 376..... 14
Postmaster v. Early, 6 U. S. (L. Ed.) 577..... 14
Price v. U. S., 174 U. S. 373..... 10

Schillinger v. U. S., 155 U. S. 163..... 10
Stackpole v. Hallahan, 16 Mont. 40, 40 Pac. 80..... 12
State v. Bartholomew, 176 Ind. 182..... 14
State v. Haworth, 122 Ind. 462, 23 N. E. 946..... 11
State v. Kent, 4 N. D. 577, 62 N. W. 631..... 11

The Delaware, 161 U. S. 459..... 14
The Paulina v. United States, 3 U. S. (L. Ed.) 266.... 14

United States v. Burr, 159 U. S. 78..... 14
United States v. Fisher, 2 U. S. (L. Ed.) 304..... 14
United States v. Howell, 20 U. S. (L. Ed.) 195..... 13
United States v. Moore, 95 U. S. 762..... 14
United States v. Ninety-Nine Diamonds, 139 Fed. 961, 25 R. C. L. 1008..... 14
United States v. Oregon R. Co., 164 U. S. 526, 25 R. C. L. 1004, Note 16..... 13
United States v. Thoman, 156 U. S. 353..... 11
United States v. Wiltberger, 5 U. S. (L. Ed.) 37..... 13

West Wisconsin R. Co. v. Foley, 94 U. S. 100..... 12
Wheeler v. Chicago, 24 Ill. 105, 76 Am. Dec. 736..... 12

Young v. Regents of University, 87 Kan. 239..... 14

Statutes

	PAGE
Paragraph 20 of Section 24 of Judicial Code as amended by Section 1122 (b) of Revenue Act of 1926	9
Revenue Act of 1926, c. 27, 44 Stat. 9, 116 (U. S. C. App., Title 26, Sec. 156)	2
Section 240 (a) of Judicial Code as amended by Act of Feb. 12, 1925	2
Section 250 (d) of Revenue Act of 1921	15
Section 1006 of Revenue Act of 1924	18
Section 1106 (b) of Revenue Act of 1926	18
Section 606 of Revenue Act of 1928	18
Section 1113 (a), Section 3226 of Revised Statutes, as amended	2
Section 3226 of Revised Statutes as amended	2, 15

Miscellaneous

Record, 7-11, 17-21	1
37 F. (2) 38	1
Record, 11, 21, 22	2
Record, 1-3, 11-14, 1	3
Record, 2, 1, 7, 12, 8, 4-5, 15	4
Record, 1, 12, 2	19
Record, 1, 12	20

Supreme Court of the United States

OCTOBER TERM, 1930.

UNITED STATES OF AMERICA, Petitioner, v. THEODORE MICHEL, Respondent.	No. 79.
UNITED STATES OF AMERICA, Petitioner, v. LOUIS KRIEGER, Respondent.	No. 80.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

Opinion Below.

The District Court for the Southern District of New York rendered no opinion. The opinion of the Circuit Court of Appeals (R. 7-11, 17-21) is reported in 37 F. (2d) 38.

Jurisdiction.

The judgments of the Circuit Court of Appeals were entered January 14, 1930 (R. 11, 21). The petition for writs of certiorari was filed April 12, 1930, and the writs were granted on May 19, 1930 (R. 22). Jurisdiction is conferred upon this Court by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Can the Government be heard to urge the defense of the statute of limitations in a suit to recover taxes brought more than two years after the rejection of a claim for refund, where the Commissioner of Internal Revenue failed to notify the taxpayer of such rejection by mail, as required by Section 3226 of the Revised Statutes, as amended, or until more than two years after such rejection had expired?

Statute Involved.

The Revenue Act of 1926, Chap. 27, 44 Stat. 9, 116 (U. S. C. App., Title 26, Sec. 156), provides in part:

> "Sec. 1113(a). Section 3226 of the Revised Statutes, as amended, is re-enacted without change, as follows:
>
> 'Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established

in pursuance thereof, but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.'"

Statement.

The facts in these two cases are substantially the same. Respondents, who were partners doing business under the firm name of Michel & Krieger, brought actions in the District Court for the Southern District of New York to recover income taxes paid for the year 1919, alleging that the partnership income had been incorrectly determined because of overvaluation of closing inventory (R. 1-3, 11-14). In each case action was instituted more than five years after the taxes were paid and more than two years after the disallowance of claim for refund, but notification to the taxpayer that the claim had been officially rejected was not given until more than two years after the disallowance.

In the *Michel* case the complaint alleged: The taxpayer filed an income-tax return for the calendar year 1919 on March 15, 1920, and paid the tax shown to be due thereon in four instalments on March 15, June 15, September 15 and December 15 of that year; a claim for refund of a portion of the tax was filed on February 7, 1924; the taxpayer was notified by the Commissioner of Internal Revenue by letter dated August 17, 1925, that the claim for refund would be rejected and the rejection would officially appear on the next schedule to be approved by him (R. 1);

the claim was so rejected by the Commissioner on September 2, 1925 (R. 2); and under the date of June 27, 1928, the Commissioner notified the taxpayer by letter of the rejection (R. 1). Action in the District Court to recover the tax was begun subsequent to September 26, 1928 (R. 7).

In the *Krieger* case the complaint alleged (R. 12): The taxpayer's return for 1919 was filed on March 15, 1920, and the tax shown to be due thereon was paid in four instalments on March 15, June 15, September 15 and December 15, 1920; a claim for refund was filed September 15, 1924; on April 2, 1925, the taxpayer was advised by the Commissioner that the claim would be rejected and the rejection would appear on the next schedule to be approved by him; the claim was so rejected by the Commissioner on April 20, 1925; and under date of June 27, 1928, the Commissioner notified the taxpayer by letter of the rejection. Action in the District Court was begun subsequent to September 26, 1928 (R. 8).

The District Court in each case granted a motion to dismiss on the ground that the complaint did not state facts sufficient to constitute a cause of action and entered judgment dismissing the complaint (R. 4-5, 15). On appeal the Circuit Court of Appeals reversed the judgments of the District Court, holding that although the actions were brought more than five years after the taxes were paid and more than two years after disallowance of the claims for refund, the statute of limitations had not run, because the statutory notification that the claims had been rejected was not given within two years after the rejection. One judge dissented without filing an opinion.

Argument.

Section 3226 of the Revised Statutes, as amended, provides that suit to recover overpayments of tax may not be begun more than five years after the payment of the tax, unless begun within two years after the disallowance of

the claim, and that the Commissioner *shall within ninety days after any such disallowance notify the taxpayer thereof by mail.* In the instant cases the Commissioner failed to give such notice after the disallowance until the two-year period had expired. The Circuit Court of Appeals held that the statute of limitations did not begin to run, and that respondents' actions were begun in time.

The Circuit Court of Appeals said that the words in the statute directing notice were "primarily intended to warn the taxpayer of the rejection of his claim and of the running of the statute"; that "the taxpayer apparently has no authoritative information as to the decision of the Commissioner except the prescribed notice by mail"; that "*notice of the Commissioner's action is required by all the necessities of the case*"; that the letters from the Commissioner advising respondents that their claims "would be rejected" were not sufficient notices to comply with the law, since the statute prescribes a notice "after" the disallowance; that the word "after" is not merely technical, but goes to the essence; that "it requires notice of the final decision, and does not leave the taxpayer to discover when that decision has been made with no aid but the prophesy of the Commissioner—a prophesy subject to a possible change of the latter's opinion"; that "the rejection appearing on the schedule approved by the Commissioner, and not the letter forecasting his action, represented his final decision as a matter of law"; that "the provisions of the statute, in our opinion, are irreconcilable unless it be held to require both a decision disallowing the taxpayer's claim and a notice to the taxpayer by mail of such disallowance before the time shall begin to run"; that "by no other construction can its mandatory provision be given effect, and its various provisions be made congruous"; that "the statute does not bar the rights of taxpayers for failure to exercise due diligence, but only after such notice is given and such time has elapsed as the act prescribes." The Court quoted from *French* v. *Edwards,* 13 Wall. 506, 511, to show that the provision prescribing notice is mandatory.

The Attorney General argues:

> 1. That the period of the statute of limitations is started by the rejection of the claim, and not by the notice.
>
> 2. That the legislative history indicates that the limitation period begins when the claim is rejected, and fails to disclose any intention on the part of Congress that the period should be extended by the failure of the Commissioner to give the notice.
>
> 3. That the requirement that notice be given was substantially complied with.

The substance of these contentions is that the provision reading:

> "The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail"

is merely directory, and that the Commissioner may disregard it if it does not suit his convenience to comply with it.

It is obvious that this provision was not inserted in the statute for administrative convenience, or to secure order, system or dispatch in proceedings. Its observance would not accomplish any of these things. Its object was to acquaint taxpayers with the time in which they may bring suit. It was to enable taxpayers to protect their rights.

Respondents had no means of knowing when their time to bring suit would elapse in the absence of the required notice. There was no other provision for communication to them of the dates when their claims were rejected. The official act of rejection was entirely intradepartmental. It was communicated by the Commissioner to the Collector, and there was no provision whereby the Collector was authorized or directed to advise the taxpayer, and he did not do so. It was the function of the Commissioner, not the Collector, to pass upon claims for refund, and the

statute specifically placed upon the Commissioner the duty of advising claimants of his action, in writing, *after* he had taken it. This duty is so reasonable and necessary for the protection of the rights of taxpayers that it would seem it should be required, as a condition precedent to the defense of the statute of limitation, even if there were no specific statutory provision.

In these cases the rejection of the taxpayers' claims was not only *not* made a public record open to their inspection, but was a fact not ascertainable by them until notice was given to them by the Commissioner. There is no place here for the doctrine of constructive notice. For this reason the law places the burden upon the Commissioner of giving actual notice by mail of what he has done, not of what he intends to do. The only step which the taxpayers could have taken would have been to make inquiries of the Commissioner. The statute absolves them from any duty in this respect. It does not contemplate that the taxpayers shall be put to the burden of making repeated inquiries in order to determine and protect their right to bring suit. Congress recognized that an undisclosed rejection would not be sufficient to start the statute of limitations, yet desired to measure the period thereof from the official act of rejection. It therefore provided specifically that the Commissioner shall give notice of such rejection within a reasonable time thereafter, and fixed that reasonable time at ninety days. Respondents had a right to rely upon the notice thus provided for. Having been led to believe, by this peremptory provision of the statute, that they would be duly and promptly notified by mail when their claims were rejected, they cannot now be fairly criticized or made to suffer for failure to make inquiries.

Statutory provisions are of two kinds, directory and mandatory. Both are, of course, intended to be complied with; but the consequences of non-compliance are not so serious in the one class as in the other. Where no rights depend upon compliance with a provision, it is classified as "directory," but where rights depend upon compliance, the provision is considered mandatory. Failure to comply

in such a case is equivalent to taking property contrary to law. Consequently, where non-compliance with a provision of a statute operates to deprive a person of a right or benefit intended to be secured by it, the courts consistently refuse to permit such deprivation and consider all proceedings in derogation of such right or benefit to be null and void.

Where a statute creates or secures to citizens certain rights or benefits, the courts will enforce such provisions. This is elementary. Consequently, they will not permit administrative officials, either by *act* or *omission*, to violate such rights or benefits.

The general doctrine was perhaps best stated by Mr. Justice Field in *French* v. *Edwards*, 13 Wall. 506, 511, as follows:

> "But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

The Attorney General seeks to distinguish this case from the cases at bar as follows:

> "The court below relied on French v. Edwards, 13 Wall. 506. We submit that this decision is clearly distinguishable from the instant case on its facts. French v. Edwards involved the validity of a tax deed. It appeared that the statutes of California provided that the sheriff in selling property 'shall only sell the smallest quantity that any purchaser will take and pay the judgment and all costs.' This Court held that the failure of the sheriff to comply with this statutory provision made the tax deed invalid. This was simply an application of the familiar rule that before a person can be divested of his property without his consent, all the

> statutory requirements must be strictly complied with. But the decision has no bearing on the question when the period of the Statute of Limitations begins to run. The statute involved in French v. Edwards operated to deprive a person of his property, while the statute involved in the instant case operated to extend to taxpayers the privilege of suing the United States in cases where that privilege did not exist before."

Respondents submit that failure to notify them when the statute began to run deprived them of a right secured to them by express provision of the statute, just as failure by the sheriff to sell the smallest quantity of property necessary to pay a judgment deprived the judgment-debtor of a right secured to him by express provision of the statute. In the latter case the non-compliance invalidated the tax deed, there being no other possible remedy for the wrong caused by it. In the instant cases the only possible remedy for the wrong caused by non-compliance with the statutory provision is a decision that the statute of limitations did not begin to run.

The Attorney General says that the statute involved in the instant cases operated to extend to taxpayers the privilege of suing the United States in cases where that privilege did not exist before. It is submitted that this statement is in error. Section 3226 of the Revised Statutes, as amended, does not confer a privilege of suing the United States, but merely states certain conditions and limitations on the maintenance of tax suits, whether brought against the United States or as personal actions against the Collector who collected the taxes. The consent to sue the United States was given in another law, to wit: Paragraph Twentieth of Section 24 of the Judicial Code as amended by Section 1122(b) of the Revenue Act of 1926. The provisions of Section 3226 of the Revised Statutes, as amended, apply equally to *common law suits* against the Collector who collected the taxes, which are the only suits allowed where such Collector is still in office and the claim exceeds $10,000. So the instant cases cannot be distin-

guished from *French* v. *Edwards*, *supra*, on the ground that the statute involved here confers the privilege of suing the sovereign. But even if it did, such distinction would not be sound. The privilege of suing the sovereign is a privilege only as between the sovereign and the taxpayer. Only Congress can revoke it. *Schillinger* v. *U. S.*, 155 U. S. 163; *Price* v. *U. S.*, 174 U. S. 373. It is not within the province of any executive or administrative official, or of any court, to withdraw the privilege by failure to comply with statutory provisions in regard thereto. The statute involved in *French* v. *Edwards*, *supra*, operated to prevent deprivation of property by selling a greater amount than necessary to pay a judgment debt. The statute involved in the instant cases operated to prevent deprivation of a benefit (whether right or privilege) created by Congress in any degree by failure to notify taxpayers when that right (or privilege) would elapse.

The Attorney General argues that statutes concerning the consent of the Government to be sued must be strictly construed in favor of the Government, especially as to the time for bringing suit. Respondents agree that the statute under consideration should be strictly construed, but insist that the entire section be construed, and that no part of it be disregarded. There is no question in this case of strict or liberal construction. Respondent's contention is that an important part of the statute under construction is being ignored as if non-existent in the Attorney General's brief.

The Attorney General further argues that if the notice provision be construed as a condition precedent to the running of the time for bringing suit against the Government, it follows that the Government has waived its right not to be bound by the negligence or default of its administrative officers. It is presumed that he means that the notice provision, construed as such condition precedent, would have the effect of a waiver of the Government's right not to be bound by failure to give notice through negligence. But this does not follow. Where a statute provides that a certain provision shall become operative

upon the performance of a specified act, the provision becomes operative when the required act is performed, and not before. This is not due to waiver, but to a positive direction of the statute. The notice provision must be given that effect in the section under consideration or read out of the law. It is submitted that the Government cannot take advantage of a statutory provision in its behalf without doing the things prescribed by that statutory provision as necessary to put it into operation. It is also submitted that this was the intention of Congress. It did not intend that the statute of limitations should run without timely notice to the taxpayers of the date from which it would be measured, so that they could determine accurately the expiration date. Otherwise there was no reason at all for the enactment of the notice provision.

Other cases which have followed the doctrine of *French* v. *Edwards*, as announced in the above quotation, are *Lyon* v. *Alley*, 130 U. S. 177; *Logan* v. *U. S.*, 144 U. S. 263; *Bowen* v. *Minneapolis*, 47 Minn. 115, 49 N. W. 683.

In statutory proceedings every act which is jurisdictional or of the essence of the proceeding or prescribed for the benefit of the party affected is mandatory. *Gallup* v. *Smith*, 59 Conn. 354, 22 Atl. 334.

Although the words of a statute are merely permissive, directory, or enabling, they may nevertheless have the force of words of command where the power or duty to which they relate is for the advancement of public justice or the security and protection of public or private rights. *State* v. *Haworth*, 122 Ind. 462, 23 N. E. 946; *State* v. *Kent*, 4 N. D. 577, 62 N. W. 631. The words "may," "shall be lawful," and the like, frequently are to be construed as "shall" or "must," where the rights of the public or of third persons depend on the exercise of the power, or the performance of the duty, to which the statute refers. *U. S.* v. *Thoman*, 156 U. S. 353; *Ex parte Simonton*, 9 Port. (Ala.) 390, 33 Am. Dec. 320; *Stackpole* v. *Hallahan*, 16 Mont. 40, 40 Pac. 80; *Kennelly* v. *Jersey City*, 57 N. J. L. 293, 30 Atl. 531; *People* v. *Brooks*, 1 Denio (N. Y.) 457, 43 Am. Dec. 704; *State* v. *Kent*, 4 N. D. 577, 62 N. W. 631.

The word "shall" in a statute may not be construed as "may" if any right to anyone depends on giving the word an imperative construction. The presumption is that the word was used in reference to such right or benefit. *Wheeler* v. *Chicago*, 24 Ill. 105, 76 Am. Dec. 736; *Stackpole* v. *Hallahan*, 16 Mont. 40, 40 Pac. 80. "Shall" ought to be construed as meaning "must" for the purpose of sustaining or enforcing an existing right. *West Wisconsin R. Co.* v. *Foley*, 94 U. S. 100.

In the instant cases the provision under consideration uses the word "shall." It provides that "the Commissioner shall within 90 days * * * notify the taxpayer thereof by mail." This is mandatory language. It is in the form of a command, and is not in the form of a grant of discretionary power. The presumption is that the word "shall" means "shall," and it should be so construed unless an intention to the contrary is clearly indicated by the context. But when the word "shall" is read with the following three words, "within 90 days," the idea of conferring discretion is entirely excluded. There would be no object in authorizing the Commissioner, in his discretion, to notify the taxpayer within ninety days. Why the specification of ninety days, if the whole matter were within the discretion of the Commissioner, and he were not required to send the notice at all, if in his judgment such procedure was too laborious or expensive? In any event, he already had full authority to notify the taxpayer in the ordinary course of his administration of the tax laws. *The only reasonable object and purpose of the provision was to prevent the Commissioner from failing to notify the taxpayer.*

It is true that the statute expressly provides that no suit may be brought after five years from payment of the tax, unless brought within two years after the disallowance of the claim for refund. But it is also true that Congress expected its mandate as to notice to be carried out, and dated the two-year period from the rejection of the claim for refund on the assumption that due notice

of the rejection would be given. Congress predicated the invariability of the first provision upon the invariability of the second. That is, it intended the limitation period to begin to run when all acts required to put the limitation provision into effect, including the notice by mail *after* the rejection, had been done, and to expire two years after the date of rejection of which the taxpayer was notified. It did not intend to catch the taxpayer in a trap, by starting a limitation period of which the taxpayer had no notice and no means of knowledge, and lulling him into a sense of security by providing for a notice upon which he had a right to rely, but which it intended the Commissioner not to send if he considered it to the best interests of the revenue not to send it. This would constitute misleading the taxpayer in order to retain overpayments of taxes, and such motives should not be imputed to Congress. Yet it is the inevitable result of the interpretation which the Attorney General seeks to place upon Section 3226 of the Revised Statutes, as amended.

A cardinal rule of statutory construction aids us at this point, which is, that significance and effect shall, if possible, be accorded to every section, clause, word or part of the act. *Adams* v. *Woods*, 2 U. S. (L. Ed.) 296; *U. S.* v. *Wiltberger*, 5 U. S. (L. Ed.) 37; *U. S.* v. *Howell*, 20 U. S. (L. Ed.) 195; *Alten* v. *Louisiana*, 103 U. S. 80; *Montclair* v. *Ramsdell*, 107 U. S. 147; *U. S.* v. *Oregon R. Co.*, 164 U. S. 526; 25 R C. L. 1004, Note 16. If the Attorney General's contention is correct, the provision for notice by mail within ninety days after rejection is a nullity, and he admits and states that the Commissioner has so treated it by ignoring it in thousands of cases. But it is not to be presumed that Congress enacted this provision for no purpose. It must be given effect.

The corollary of the above-stated cardinal rule of construction is that the several provisions of the statute should be construed together in the light of the general purpose and object of the act so as to give effect to the main intent and purpose of the legislature as therein expressed. *Pennington* v. *Coxe*, 2 Cranch. 33, 2 U. S.

(L. Ed.) 199; *U. S.* v. *Fisher*, 2 U. S. (L. Ed.) 304; *Postmaster* v. *Early*, 6 U. S. (L. Ed.) 577; *Pollard* v. *Bailey*, 22 U. S. (L. Ed.) 376; *U. S.* v. *Moore*, 95 U. S. 762; *U. S.* v. *Burr*, 159 U. S. 78; *The Delaware*, 161 U. S. 459; *U. S.* v. *Ninety-Nine Diamonds*, 139 Fed. 961; 25 R. C. L. 1008. If different portions of the statute seem to conflict, they should, if practicable, be harmonized, that construction being favored which will render every word operative rather than one which makes some words idle and nugatory. *Calhoun Gold Mine Co.* v. *Ajax Gold Mine Co.*, 27 Colo. 1; *Cory* v. *Carter*, 48 Ind. 337; *State* v. *Bartholomew*, 176 Ind. 182; *Young* v. *Regents of University*, 87 Kan. 239.

A further rule of construction is that an absurd result will be avoided if an interpretation can be found which will be reasonable. 25 R. C. L. 1019; *The Paulina* v. *U. S.*, 3 U. S. (L. Ed.) 266; *Fleckner* v. *U. S. Bank*, 5 U. S. (L. Ed.) 631; *Murdock* v. *Memphis*, 22 U. S. (L. Ed.) 429; *Shaw* v. *North Pennsylvania R. Co.*, 101 U. S. 557; *Chew Heong* v. *U. S.*, 112 U. S. 536; *Glover* v. *U. S.*, 164 U. S. 294. It is not considered necessary to cite the many cases supporting these three principles of statutory construction, which are not only thoroughly established, but are based on common sense.

Applying these principles to Section 3226 of the Revised Statutes, we find that unless the provision for notice be held mandatory, the statute would have an absurd result, for it would start a limitation period running against the taxpayer, which would elapse and expire without his knowing that it had started to run, and without his having the means of obtaining such information. It would have an important provision rendered nugatory, unenforceable, and of no effect whatever. But if that provision be held mandatory, the reasonable and salutory object of the entire statute would be effected. The section provides for a right of taxpayers to sue for refund of overpayments of taxes within a specified time, and provides for notice to the taxpayers of the time so allotted, so that they may be enabled to avail themselves of it.

The two parts of the statute are capable of being construed harmoniously together. The limitation provisions do not start to operate until the required notice is given, and then, when they do take effect, continue until the expiration of two years from the date of a past event concerning which notice was given.

We can give an instance where a statute of limitations began to run three years after the date from which it was measured for a five-year period, and ran the remaining two years to the expiration of the five-year period. Section 250(d) of the Revenue Act of 1921 provided that income and profits taxes for 1917 must be determined, assessed and collected within five years after the returns were filed. Returns for 1917 were filed normally on March 1, 1918. The Revenue Act of 1921 was enacted November 23, 1921. It is clear that the five-year limitation provision did not take effect and begin to operate until November 23, 1921. Three and one-half years of the five-year period had expired before the limitation provision came into existence. But it then became and remained operative until the five-year period expired on March 1, 1923.

It is obvious that the running of this statute of limitations was not started by the filing of the return in 1918. It was started by the enactment of the Revenue Act of 1921 on November 23, 1921, and ran from that date until March 1, 1923, not from March 1, 1918, to March 1, 1923.

It is immaterial that the date from which the limitation period is measured is in the past at the time the statute of limitations takes effect, if the expiration date is in the future.

So, under Section 3226 of the Revised Statutes, as amended, giving effect to all the provisions of that section, the statute of limitations starts to run when the Commissioner notifies the taxpayer by mail of the rejection of his claim for refund, within ninety days after such rejection, and expires two years after the date of rejection. But if the statutory notice is not mailed, respondents contend that the statute of limitations does not start to run. The

lapsing of the two-year period from rejection is of no effect where the statute of limitations was not put into operation by the performance of a necessary condition to such operation.

Consequently, the Attorney General's first argument is, respondents submit, basically erroneous. He says that the statute of limitations is put into operation by the rejection of a claim for refund. Such rejection necessarily occurs before the final act required by the statute to put the statute of limitations into operation, which is the mailing of a notice to the taxpayer *after* the rejection, advising him thereof. Respondents submit that, giving effect to the provision requiring notice of rejection within ninety days after rejection, the statute of limitations is put into operation by the mailing of such notice, and runs from that time until two years from the date of rejection, and that where such notice is not given the statute of limitations does not begin to run.

The legislative history is consistent with respondent's construction. One very important element of the legislative history of Section 3226 of the Revised Statutes, which the Attorney General fails to mention, is that the provision for notice of rejection within ninety days after such rejection was enacted at the same time and as a part of the provision allowing two years after rejection within which to bring suit. The two provisions were enacted contemporaneously as part of the same section and were obviously intended to be correlative. Although the reports of the Finance Committee and the Conference Report make no reference to the requirement of notice, it is evident that what they did say was subject to the understood condition that notice be sent as provided, because the notice requirement is part of the section under discussion. The following language, quoted by the Attorney General on page 12 of his brief from the report of the Finance Committee, is significant:

> "If the section be amended, as above suggested, the taxpayer will not have to start any suit until it has been definitely determined that the Bureau has disallowed his claim."

The taxpayer cannot definitely determine that the Bureau has disallowed his claim until the Bureau notifies him that it has disallowed it. That is the reason for the provision requiring notice by mail *after* such disallowance. The language quoted certainly contemplates notice of some sort, and manifestly the notice contemplated was that specifically provided for in the bill which was being reported on.

The Attorney General can derive little aid from the legislative history. There is nothing in it inconsistent with the notice provision, and nothing in it which indicates that it was not intended to be complied with. The absence of any mention of the notice provision in the reports of committees indicates rather that its language was so clear, specific and absolute that no report upon it was necessary. And, as above shown, the Finance Committee Report quoted by the Attorney General and above quoted in this brief contemplated that the taxpayer would not have to bring any suit until notified that the Bureau had disallowed his claim.

The third argument of the Attorney General is that the notice requirement was substantially complied with. This is an attempt to justify what he recites as the practice of the Bureau of Internal Revenue, although the facts regarding such practice are not to be found in the record, and appear only in statements in the Attorney General's brief. Respondents are not willing to concede that these statements are correct. We do not know what occurred with respect to other claims, and should not be bound or prejudiced by anything the Attorney General has said in that regard. What has happened with respect to other claims has nothing to do with the correct determination of the cases at bar. The matters stated by the Attorney General are subject to proof, if material, and cannot properly be brought before the Court by mere statements of counsel. This applies to the statement that there are now outstanding 172,969 claims involving $2,017,716,241.52, as to which no notice of rejection has been given. Respondents deny

this statement. This denial is based upon nothing at all, but is entitled to just as much weight as the Attorney General's assertion, since neither is in the record or properly brought to the attention of this Court as a fact.

The Attorney General's statistics, ostensibly given to show the uniformity of the Bureau's practice—which itself is not properly presented to this Court as a fact—is also probably intended to arouse apprehension in the mind of this Court as to the vast number of claims, supposed to be closed, which would be open for suit if the decision of the Circuit Court of Appeals in the instant cases is sustained. This line of argument is not only improper because based upon alleged facts not in the record, and immaterial, because volume of violations of a statute is no argument as to its proper construction, but is made on lump sum statistics which do not tell the full truth. The Attorney General does not show how many of the claims rejected without the statutory notice have been foreclosed forever by statutory "closing agreements"; Section 1006, Revenue Act of 1924; Section 1106(b), Revenue Act of 1926; Section 606, Revenue Act of 1928; or by compromises, or by final decisions of the Board of Tax Appeals, or how many of these claims are based upon legal questions which have been determined by this Court adversely to the taxpayers' contentions. The great majority of the claims mentioned are probably dead claims. The Attorney General has failed to state, among his *off-the-record* facts, that it has also been the uniform practice of the Bureau of Internal Revenue to solicit closing agreements from every taxpayer; and he has also failed to mention the vast number of duplicate claims, that is, claims covering the same years and subject-matter. Even if it could be conceived that a large number of suits could be brought by reason of the failure to send notices of rejection, the right to refund would have to be established by proof of facts and law. If the volume of claims that might be affected by this case is material, respondents claim the right of cross-examination as to the facts recited, and the right to introduce evidence in rebuttal and explanation.

For the reasons stated, respondents submit that no weight whatever should be given to the recital of facts contained in the third argument in the Attorney General's brief, except as to what was done in the instant cases.

The third argument of the Attorney General is thus reduced to three sentences on pages 13 and 14 of his brief, reading as follows:

> "* * * notice was sent to each respondent advising him that his 'claim for refund would be rejected and that this rejection would officially appear on the next schedule to be approved by' the Commissioner (R. 1, 12). The approval of the schedule occurred less than three weeks after the mailing of the notice. The giving of a notice in that form shortly before the rejection appeared on the official schedule has been held to be a sufficient compliance with the requirements of the statute."

The notice referred to was a letter sent to respondent Michel on August 17, 1925, and his claim was rejected on September 2, 1925; to respondent Krieger on April 2, 1925, and his claim was rejected on April 20, 1925 (R. 1, 2, 12). These letters, if considered as notices, referred to a contemplated act to be done at an indefinite future date, whereas the statute required a notice *after* the act of rejection stating when it was done. The notice provision would be out of place in Section 3226 of the Revised Statutes, as amended, except for its relation to the statute of limitations on bringing suits, as that is the subject-matter of the section. The word "thereof" in the phrase "shall * * * notify the taxpayer thereof by mail" refers to the consummation of the rejection, but principally to the time of such consummation.

The cases cited by the Attorney General as holding that the letters before rejection were sufficient compliance with the notice requirement are not in point. In *Daily Pantagraph* v. *U. S.*, 37 Fed. (2nd) 783, 788, 789, the claims had never been rejected, but suit was brought more than six months after they were filed. The stipulation clearly shows these facts. The Commissioner in that case urged

his own default in passing on the claims as a defense. The question as to *sufficient notice after rejection* was not involved. In *Connell* v. *Hopkins*, 43 Fed. (2nd) 773, 776, the question was whether a *claim for refund* was filed in time, and the question whether sufficient notice was given under Section 3226 of the Revised Statutes, as amended, was not involved. *McKesson & Robbins, Inc.* v. *Edwards*, 38 Fed. (2nd) 887, 888, is pending on appeal. The notice provision in Section 3226 had not been called to the attention of the District Court when it rendered its decision and there was nothing before the Court to show that the notice of rejection had not been given.

The two-year period runs from the actual dates of rejection and not from the dates of advice as to the Commissioner's contemplated future action. At the time the letters of August 17, 1925, and April 2, 1925, were sent, the claims had not yet been rejected. This is a given fact in these cases, the allegations in the complaints to this effect being based on the Commissioner's statement in his letters to respondents of June 27, 1928 (R. 1, 12). It is a fact determined in accordance with the practice of the Bureau of Internal Revenue and the law as stated by this Court. A statement by the Commissioner, as was made in these cases, that he intends, in the future, to disallow a claim, by a contemplated future official act requiring his approval, is not the rendition of a decision by him, and does not constitute the disallowance of the claim. If it did it would follow that a similar statement of his intention to allow a claim in part and reject it in part would constitute the rendition of his decision to allow the claim in part and reject it in part; but this would be contrary to the decision of this Court in *Girard Trust Co.* v. *U. S.*, 270 U. S. 163, in which it was held that the claim for refund was allowed in part at the time the Commissioner approved and signed the schedule returned by the Collector showing the state of his account with the taxpayer. Under this decision the Commissioner's letter to the taxpayer stating his intention to allow the claim in part and to reject it in part

did not constitute either the rendition of his decision or the allowance or disallowance of the respective parts of the claim; for the official act of approving the schedule was held to constitute the allowance of the part of the claim allowed, and, consequently, the disallowance of the other part.

There is no statutory provision requiring the sending of letters of intention to allow or reject claims, but only Bureau practice and courtesy. There is no set time, after the sending of such letters, for the actual rejection, but such rejection occurs at the convenience of the Commissioner and the Bureau.

The statute distinctly requires notice of disallowance *after* the disallowance. This undoubtedly refers to the official rejection which constitutes the final decision of the Commissioner. The statute uses the word "disallowance," which is the opposite of "allowance." This Court held, in *Girard Trust Co.* v. *U. S.*, *supra*, that the "allowance" or partial "allowance" of a claim occurs when the schedule is delivered to the Commissioner and made effective by his approval. It follows that the partial "disallowance" or entire "disallowance" also occurs when the schedule is officially approved by the Commissioner.

The word "after" is of great importance, because it is only "after" the rejection that the Commissioner can state definitely the date of rejection. Until the actual official act, he can only intend and prophesy. Many things may occur, and frequently have occurred, to prevent the official act from happening. In many instances claims as to which letters of intention to disallow were sent were subsequently allowed in whole or in part. This has occurred often in counsel's own experience. Among the things which may prevent disallowance, after the letter of intention to disallow, are: (1) a new Commissioner may take office, who is not bound to carry out the intention of his predecessor; (2) a controlling court decision may be handed down, which would compel a different course of action; (3) the subordinate officials may change their recommendation to the Commissioner, due to discovery of new facts,

or to a change in regulations or Bureau policy; (4) Congress may enact a statute requiring allowance of the claim. The letters of intention to disallow at an indefinite future date are transcripts of the recommendations of subordinate officials to the Commissioner which are presented with the schedule which he must approve in order to officially disallow the claims, and are not notices *after* the disallowance.

It is true that the letters of intention to reject were sent only about three weeks prior to the rejections, but if they had been sent only the day before, the taxpayers would have been no better informed as to the date the statute began to run against him. The letters of intention referred to an indefinite time in the future, for the reason that it was not known in advance when the schedule and recommendations would be delivered to the Commissioner for his approval. The taxpayers were entitled to two full years after the rejection within which to sue, but this provision availed them nothing unless they were informed when their claims were rejected so that they could calculate the time when the two years would expire.

It is submitted that a letter stating, "Your claim will be rejected sometime soon," or "in two or three weeks," is not a substantial compliance with the requirement that

> "The Commissioner *shall* within 90 days *after* any such disallowance notify the taxpayer *thereof* by mail."

The Attorney General argues that the re-enactment of this provision without change in the Revenue Act of 1926 shows Congressional approval of the practice adopted by the Treasury Department. It is indeed difficult to understand how re-enactment of a provision requiring notice shows legislative approval of the continued absolute disregard of that provision. On the contrary, the re-enactment of the provision indicates emphatically the intention that it be complied with. Congress cannot enforce its mandatory provisions, that being the function of the judiciary.

The strongest expression it could make of its intention that the provision be carried out was re-enactment without change.

Conclusion.

The Commissioner failed to carry out a mandatory provision of Section 3226 of the Revised Statutes, as amended, that within ninety days after disallowance of a claim for refund he shall notify the taxpayer thereof by mail. The respondents received no notice of such disallowance, and two years after such disallowance elapsed without suit being brought. The only way to remedy the wrong and enforce the mandatory provision is to hold, as the Circuit Court of Appeals did, that the statute of limitations did not begin to run.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

DONALD HORNE,
MORTIMER J. WOHL,
Attorneys for Respondents.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

Nos. 79, 80.—October Term, 1930.

The United States of America, Petitioner, 79 *vs.* Theodore Michel.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
The United States of America, Petitioner, 80 *vs.* Louis Krieger.	

[February 24, 1931.]

Mr. Justice Butler delivered the opinion of the Court.

These actions were brought in the District Court for the Southern District of New York. Each respondent sued to recover income taxes incorrectly determined for 1919 and paid in 1920. On defendant's motion in the nature of a general demurrer that court dismissed. The Circuit Court of Appeals reversed. 37 F. (2d) 38.

The sole question is whether the actions were commenced within the time allowed by R. S., § 3226, as amended. 26 U. S. C., § 156.

In 1924, Michel on February 7, and Krieger on September 15, filed a claim for refund. The Commissioner of Internal Revenue by a letter dated August 17, 1925, advised Michel that his claim would be rejected and that the rejection would officially appear on the next schedule to be approved by him. The claim was rejected September 2. The Commissioner, April 2, 1925, sent a like letter to Krieger, and his claim was rejected April 20. The Commissioner did not give notice to either of them that his claim had been disallowed or the date of disallowance until June 27, 1928. The suits were subsequently brought more than two years after the rejections and less than two years after the notices.

Section 3226 as amended provides:

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have